SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

SAM CERAMI,
Petitioner,

versus

WM. D. HAAS, JR.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

May It Please the Court:

This matter is before this Court on petition of SAM CERAMI, defendant and appellant, for a writ of certiorari to the Supreme Court of the State of Louisiana, the highest court of that State, to review a final judgment of said Court in the case of *Wm. D. Haas, Jr., v. Sam Cerami, No. 36,318,* ..... *La.* ....., *10 So. 2d 61,* (Adv. November 19, 1942), (R. 181).

JURISDICTION

This Court has jurisdiction to grant certiorari, under U. S. C. title 28, 344 (b), and to inquire into questions of fact and of law and fact, for the reasons: (a) Petitioner alleges that the judgment of said Court denies a right or title claimed by him under the Constitution of the United States timely raised by him in conformity to the rules of practice of that State; (b) that a ruling complained of was first made by the Supreme Court, and he timely raised the Fedeeral question with respect to it, in a petition for rehearing in that Court; (c) that said Court did not directly rule on any of the three Federal questions raised by him, but the judgment was not and could not have been rendered under principles broad enough to support it, without the Court considering said questions and denying his claim; (d) that said judgment is not supported by any legal evidence, and the Court was able to render it only by rejecting all his evidence; and (e) that said judgment is in contravention of articles of the Constitution and statutes of that State.

The Supreme Court has jurisdiction to review by certiorari a judgment of a state court of last resort, alleged by a petitioner to deny a right, title or immunity claimed by him under the Constitution of the United States.

> *Virginia Imperial Coal Sales Co., 293 U. S. 15, 16, 17, 79 L. Ed. 171, 173;* and cases cited in paragraph 3 (c) of the petition.

Where the ruling claimed to infringe Federal rights is first made by the state court of last resort, a Federal question raised with respect thereto on application for rehearing is timely, since it is raised at the first opportunity.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 677, 678, 74 L. Ed. 1107, 1112; and other cases cited in paragraph 3 (e) of the petition.

Where it affirmatively appears upon the face of the record that a Federal question constituting an appropriate ground for review was presented and was expressly or necessarily decided by a state court of last resort, in order to render its judgment, the Supreme Court has jurisdiction to review the judgment.

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U. S. 312, 319, 320, 74 L. Ed. 870, 975; and other cases cited in paragraph 3 (d) of the petition.

Where the asserted right has been denied the Supreme Court is not concluded by a finding of fact or of mixed fact and law, made in the state court; the Supreme Court will examine the evidence to see whether or not it supports the decision against the Federal right.

Great Northern R. Co. v. Washington, 300 U. S. 154, 165, 81 L. 573, 581;
Norris v. Alabama, 294 U. S. 587, 589, 79 L. Ed. 1079, 1081.

STATEMENT OF THE CASE

In his petition the plaintiff alleged that on November 1, 1938, respondent sold him a one-fourth royalty interest in certain lands, and agreed *in the sale* to deliver a deed therefor upon perfection of a then apparent defect in the title. He filed with and as part of the petition a copy of "contract," (R. 3, 26). He alleged that by judgment in

Cerami v. Haas, (R. 203), the validity of the *sale* had been upheld, and that in the suit of *Angichiodo v. Cerami et al.,* (R. 47, 53), there was judgment decreeing him to be a *holder* in good faith as having *purchased* on his faith in the public records, and that he had demanded and was entitled to a royalty deed evidencing the *sale* of said royalty interest; and he prayed for such judgment.

Plaintiff relied upon the judgment in *Cerami v. Haas,* as *res judicata* on the validity of the instrument as a sale, and did not allege acceptance of the contract or consideration. Since the *Angichiodo* suit claiming title to the land was still pending, petitioner filed an exception of prematurity, (R. 4), which he withdrew, (R. 5), after his counsel examined the opinion of the Judge of the United States Court in *Angichiodo v. Cerami,* (R. 47, 53), and believed the judgment would not be reversed on appeal. Defendant filed an answer, (R. 7), denying categorically the allegations of the petition, and also alleged nullity of the instrument, for want of mutuality and consideration. Relying on the general law of Louisiana governing contracts, and specifically certain articles of the Civil Code, he alleged that only by disregarding both the letter and the spirit of those laws could the court render against him the judgment plaintiff sought, paragraphs 5, 9, 11, 18, 19 and 20 of the answer. In paragraph 17 of the answer, so pleading only in the event the court should hold that the instrument upon which plaintiff was proceeding was a complete reciprocal agreement to sell, defendant alleged that the price of $600 was out of all proportion to the value of the royalty interest which was the subject of the instrument, which he alleged to be more than $25,000. He filed a supplemental answer, (R. 13), to make the allegations of paragraph 17 more certain.

On the trial of the case, counsel for plaintiff offered in evidence the instrument sued on, to which counsel for defendant objected on the ground that the instrument was not in form and substance an act translative of title, and was not a complete contract, because, as appeared on its face, plaintiff had not accepted it and defendant had executed it without consideration. Plaintiff offered the record and judgment in *Cerami v. Haas*, P. Ex. 7, (R. 198-210), and copies of proceedings and the judgment of August 14, 1939, in *Angichiodo v. Cerami*, P. Ex. 2, 3, (R. 27-53), to all of which counsel for defendant objected as irrelevant and on the ground that plaintiff was suing on an alleged completed contract of sale and there was no authority or means in law to enforce specific performance thereof. All the objections were overruled, (R. 21).

Counsel for defendant offered in evidence depositions of Moresi, Carnahan and Lambremont taken before a Notary Public, (R. 21), and D. Ex. 2 to 22, inclusive, (R. 87-177). On objection by counsel for plaintiff they were ruled inadmissible.

There was judgment for plaintiff as prayed for, except that the judgment ordered petitioner to execute a royalty deed as of February 10, 1939, the date it was said in the opinion in *Cerami v. Haas*, (R. 203), that plaintiff's acceptance of the instrument was implied from his filing it for record. Petitioner filed a rule for a new trial, (R. 61), in which he reiterated the Federal question with respect to the validity of the instrument as a complete contract and basis for judgment, and also raised a Federal question on the ground of the court having failed to give consideration to the evidence of value of the royalty interest, and giving judgment against him.

Petitioner appealed to the Supreme Court, which affirmed the judgment of the district court, (R. 181), but on a finding that the instrument was an agreement to sell, to the specific performance of which plaintiff was entitled. The Court also held that the judgment in *Cerami v. Haas*, (R. 203), was *res judicata* on the validity of the instrument as an agreement to sell, and then considered the validity sufficiently to hold that the simple affidavit appended to the instrument was an acceptance of it.

Petitioner applied for a rehearing, (R. 186-193), and in his petition again set up the Federal questions that had been raised in the district court, and also raised a third Federal question with respect to the Supreme Court first making the ruling in the case that the judgment in *Cerami v. Haas* was *res judicata* on the validity of the instrument as an agreement to sell. The rehearing was refused and the judgment is final, (R. 194).

SPECIFICATION OF ERRORS

1. Giving effect to the judgment in *Cerami v. Haas, 195 La. 1048, 197 So. 752*, (R. 203), as *res judicata* and the law of the case, as holding the instrument upon which plaintiff sues, (R. 3, 26), valid as a reciprocal *agreement to sell*, and founding its judgment against petitioner on that ruling. Judgment, this case, R. 181.

2. Ruling that the instrument upon which plaintiff is proceeding, (R. 3, 26), is a complete reciprocal contract to sell and decreeing that petitioner is bound by said instrument and shall convey to plaintiff the one-quarter royalty interest described therein, or that the judgment shall stand as a muniment of title in plaintiff. Answer, R. 7, pars.

5, 9, 11, 18, 19 and 20; Judgment, district court, R. 56-60; Rule for new trial, R. 61, pars. 1, 2, 2 (a) (c); Opinion and judgment, R. 181; Petition for rehearing, R. 186, pars. 6, 7 and 14. Second Question in Petition.

3. Having held that the instrument upon which plaintiff is proceeding, (R. 3, 26), was a complete reciprocal agreement to sell, in rejecting petitioner's pleading that the price stipulated in the instrument was out of all proportion to the value of the royalty interest which is the subject of said agreement at the date of the sale, and the proof thereof. Answer, R. 7, par. 17; Supplemental answer, R. 13; Opinion and judgment of trial court, R. 56; Rule for new trial, R. 61, pars. 1, 2, 2 (b), (c); Opinion and decree of Supreme Court, R. 181 185; Petition for rehearing, R. 190, pars. 10, 11, 12; Opinion *per curiam*.

POINT 1, FIRST QUESTION

Petitioner contends that, by giving effect to the judgment in *Cerami v. Haas, 195 La. 1048, 197 So. 752, (R. 203)*, as *res judicata* and the law of the case, as holding the instrument upon which plaintiff sues, (R. 3, 26), valid as a *reciprocal agreement to sell*, and founding its judgment against petitioner on that ruling, the Supreme Court of Louisiana has erred, and the judgment should be decreed null and void, and that said judgment deprives petitioner of his vested rights and of his property, without due process of law, in contravention of that clause of Sec. 1 of the Fourteenth Amendment, providing, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Petition herein, par. 4; Petition for Rehearing, pars. 1-3, 13, R. 186-188, 191.

POINT 1, (a). The judgment in *Cerami v. Haas*, is void, because it is not responsive to the pleading or within the issues of that case, and the courts had no jurisdiction to render it.

POINT 1, (b). If the judgment in *Cerami v. Haas* should be held valid, giving effect to it as *res judicata* and settling finally the validity of the instrument, as *an agreement to sell*, is not responsive to plaintiff's pleading or within the issues of this case, and the Supreme Court had no jurisdiction to render the judgment based upon that ruling, and the judgment is void.

POINT 1, (c). Petitioner timely raised the Federal question in his application for rehearing in the Supreme Court, since plaintiff pleaded the judgment in *Cerami v. Haas* as *res judicata* on the validity of the instrument as a sale, and the ruling was first made by the Supreme Court that the judgment was *res judicata* on the validity of the instrument as an agreement to sell.

POINT 1, (a)

The ruling criticized here is found in the opinion of the Supreme Court, (R. 181-184), and petitioner's pleading with respect to it is found in his application for rehearing, pars. 1-3, 13, (R. 186-188, 191), to which the Court's attention is invited, in lieu of restatement here.

The Court said, (R. 183), that the jurisprudence of the State, as enunciated in *Siegel v. Helis, 186 La. 506, 172 So. 768*, and the other cases cited, was:

> "That if defendant in a jactitation, or action for slander of title, does not answer *or otherwise*

plead to the suit, and if the plaintiff takes a judgment against him by default, the only judgment that can be rendered is a judgment ordering the defendant to bring a petitory action within the time stipulated in the judgment or forever hold his peace."

That statement falls far short of a full appreciation of the principles upon which the jurisprudence is founded. Deleting the word, "*or otherwise plead*", to which we shall refer later, the statement quoted is, as far as it goes, correct, except that it treats the Siegel-Helis Case as affirming *a single proposition of law*, applicable only where the defendant does not answer and the plaintiff takes judgment against him by default, and cites *Shreveport v. Kahn, 194 La. 55, 193 So. 461*, to the same effect. The decision in each of these cases is based upon the *two essential principles applicable to all slander of title suits*, and the *third principle that no issue of title is created by the entering of the preliminary default*. These two esesntial principles are: (1) that the *object* of the slander of title suit is *to protect possession, not to establish title, and the suit does not try the issue of title unless the defendant in his answer tenders that issue, and the issue of title in such case can be created by him only by setting up in his answer title in himself*, by means of which he becomes a plaintiff in reconvention and converts the action into a petitory one; and (2) that the *plaintiff in a slander of title suit cannot engraft on the proceeding an issue of title, either by a demand to be declared the owner of the property or by alleging the invalidity of the instrument complained of as slander of his title*. From these principles it necessarily follows that "*in the absence of an answer setting up title, the only possible issues involved in the suit are the possession*

of the plaintiff and the slander of the defendant." *Siegel v. Helis, supra, Shreveport v. Kahn, supra.* The *third* principle, the only one to which the Court referred, is applicable only in a case where the defendant does not answer and the plaintiff takes a judgment against him by default, and is really a general principle of pleading, that entering a default creates no other issue than that presented by the relevant allegations of plaintiff's petition, and is applicable to all kinds of cases. It is stated in *Siegel v. Helis, supra,* and *Shreveport v. Kahn, supra,* that "*the entry of the preliminary default is not sufficient to raise the issue of title,*" since "the entry of the default has no other effect than to form a tacit joinder of issue *on the basis of a general denial*" and "*merely serves to put plaintiff on proof of the relevant facts alleged.*"

The facts and the pleadings in *Cerami v. Haas,* as disclosed by the petition, (R. 198), were strikingly similar to those in *Siegel v. Helis,* but why, in view of the jurisprudence and the decision in the latter case conforming to it, the pleading in the former seems to have been patterned on that of the latter the writer, who was not in that case until it was on application for rehearing, does not know. The facts and the pleadings in *Siegel v. Helis* are found in the report of the case in the *Court of Appeol, 170 So. 268,* but we state them briefly: In addition to the usual allegations of possession by the plaintiff and slander of his title by defendants by recordation of certain instruments, the plaintiff alleged that *the claims of the defendants were false and that he was entitled to have them canceled from the public record and to judgment declaring him to be the absolute owner of the property, free from any claim by defendants. The prayer conformed to the*

petition. None of the defendants answered, and there was judgment by default in favor of plaintiff, in conformity to the prayer, (1) quieting him in his possession, (2) decreeing that defendants were without right, title or interest in the mineral lease, (3) decreeing plaintiff to be the owner of the lease by clear and unencumbered title, and (4) ordering the recorder to cancel from the conveyance and mortgage records the instruments complained of as slander of plaintiff's title, in so far as they affected his lease. The case finally reached the Supreme Court, and its opinion contains an able and instructive re-statement of the law:

> "Plaintiff's petition and prayer disclose that this is a jactitation or slander of title suit purely and simply. *The object of such suit is to protect possession, not to establish title,* unless defendant tenders that issue in his answer. No issue of title was tendered by defendants, and in no such issue was raised by the entry of the preliminary default. The entry of the preliminary default had no other effect than to form a tacit joinder of issue on the basis of a general denial. It merely served to put the plaintiff on proof of the *relevant facts alleged. No issue of title could be engrafted into the action by plaintiff's demand to be declared the owner of the mineral lease. In the absence of an answer setting up title, the only possible issues involved in the suit are the possession of the plaintiff and the slander by the defendants.* That is all that the plaintiff was entitled to prove. But the judgment of the district court not only maintained plaintiff's possession and condemned defendants as slanders of his title; it also decreed plaintiff to be the owner of the mineral lease by clear and unencumbered title. *In this respect it went further than authorized by law,* as

was correctly held by the Court of Appeal." *(Italics ours.)*

Further stating the nature, purpose and effect of the jactitation or slander of title suit, the Court said:

> "In a jactitation or slander of title suit, the relief sought is that defendant be ordered to bring suit to establish his pretensions, pay damages for slander, and that plaintiff be quieted in his possession. *It does not try the issue of title, unless defendant in his answer chooses to tender the issue of title, the character of the action was not changed.* Plaintiff having proved his possession and the slander, the Court of Appeal was correct in ordering appellants to institute their suit in revindication of their rights appearing on the public records, thus terminating the action. As shown by the opinion of the Court of Appeal on rehearing, *the judgment is in acordance with the prayer of the plaintiff's petition.*" (Italics ours.)

Obviously, the Court meant the judgment was in accordance with the *legal* prayer of plaintiff's petition, because all the petition and prayer, except that within the scope of the jactitation or slander of title suit, had been rejected as though not made by the Court of Appeal and the Supreme Court. *Shreveport v. Kahn, supra,* follows this decision *verbatim.*

> *Rudd v. Land Co., 188 La. 490, 177 So. 583; Allison v. Maroun, 193 La. 286, 190 So. 408; Ludeau v. Jacob, 192 La. 902, 189 So. 570.*

The principles upon which it is held that a question of title is not and cannot be involved in a slander of title suit are not founded on jurisprudence alone; they are in

deference to the statutory law of the State. As was said in *Patterson v. Landru, 112 La. 1069, 1074, 36 So. 857, 858,* Being in *possession,* the owner cannot bring a petitory action, the proceeding by which one *out* of possession may test his claim to title with another *in* possession, Code of Practice, Art. 5, or with another *also out* of possession, Act 38 of 1908. And in *Ludeau v. Jacob, 191 La. 427, 175 So. 458,* it was said that a jactitation or slander of title suit is a personal action. There is no law authorizing one *in* possesion to test his claim to title with another *out* of possession.

In the first sentence of its opinion in *Cerami v. Haas,* (R. 203), the Supreme Court said, "This is a jactitation suit," and so had each side said in the first sentence of its brief. It is so recognized in the opinion in this case, (R. 185). But it is said that the nature of the slander of title suit is changed if the defendant answers *or otherwise pleads.* It is also said that the principles of the cited cases do not apply to the case of *Cerami v. Haas,* because the validity of the instrument was put at issue by the allegation of Cerami that it was not valid and pleading of Haas that the petition did not set forth a right of action, because the instrument was valid. All this clearly conflicts with the principles we have discussed. Moreover, the pleading and the prayer in *Siegal v. Helis, supra,* were almost exactly the same as in *Cerami v. Haas,* while in *Shreveport v. Kahn, supra,* the petition was the same and the defendant filed an exception of no cause of action, just as Haas did. It was not said in the *Kahn* case that the allegations of the petition that the instrument was invalid and the exception of defendant had the effect of changing the nature of the suit and putting the validity of the instrument in issue; the ruling was just the contrary.

"Courts are not at liberty to decide cases upon issues which are raised only in argument and which irreconcilably conflict with those presented by the pleadings." *Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207, 220.*

The principle is jurisdictional and is clearly stated in *33 C. J. 1076:*

"In addition to jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant. *A judgment not authorized by law is void. Jurisdiction is limited to a determination of the issues presented for decision.*" (Italics ours.)

And on page 1139:

"A court cannot properly put upon its record a judgment which is not a proper sequence to the pleadings. *The judgment must conform to and be supported by the pleadings in the case.*" (Italics ours.)

In *Stockton v. Reynolds, 140 U. S. 254, 35 L. Ed. 464,* it was said that, in addition to jurisdiction of the persons and the class of cases to which the one to be adjudged belongs, it is essential to the validity of the judgment that the point to be decided be, in substance and effect, within the issue.

The principles upon which it is held that an issue of title is not and cannot be involved in a slander of title

suit are inherent in the statutory law of the State, and the jurisprudence recognizes, but cannot change them. More than a century ago, it was said in *Livingston v. Heerman, (La.) 9 Mart. (O. S.) 714*, that, *being in possession*, the plaintiff could not bring a petitory action, the proceeding by which one *out of possession* may test his claim to title with another *in possession*. *Code of Practice, Art. 5.* And in *Patterson v. Landru, 112 La. 1069, 1074, 36 So. 857, 858*, it was quoted with approval and followed. In *Ludeau v. Jacob, 191 La. 427, 430, 185 So. 458*, it was said that a slander of title suit is a personal action.

There is no law in Louisiana authorizing one *in possession, as plaintiff*, to test his claim to title with another *out of possession*. And since an issue of title pleaded by a plaintiff in a slander of title suit is not permissible, it was held in *Siegal v. Helis, supra, Shreveport v. Kahn, supra, Ludeau v. Jacob, supra, Flanagan v. Land Development Co., supra*, and in a line of decisions for more than a century that a judgment founded on such pleading is not responsive to the permissible pleading or within the legal issues of the case, and the court has not jurisdiction to render it.

We submit, therefore, that the judgment in *Cerami v. Haas* is void, that in holding it valid and *res judicata* on the validity of the instrument involved as an agreement to sell, and in enforcing it against petitioner, the Court has sustained and enforced a judgment which it had not jurisdiction to render, and so has deprived petitioner of his property, without due process of law.

POINT 1, (b). Giving effect in this case to the ruling that the validity of the instrument as an *agreement*

to sell is *res judicata* or settled finally by the judgment in *Cerami v. Haas* is not responsive to plaintiff's pleading or within the issues of the case as presented by that pleading. Hence, the judgment herein is null and void.

Haas sued on the instrument as a *completed and executed sale* and prayed for judgment ordering petitioner to execute a deed *evidencing the sale.* In his petition, (R. 1), he alleged: par. 2, that *by the instrument,* which he makes part of his petition, petitioner *sold* the royalty interest to him and agreed *in the sale* that, upon perfection of title defects then being straightened out, he would *deliver a deed;* in par. 3, that the *validity of the sale was upheld* by the judgment in *Cerami v. Haas;* in par. 4, that in *Angichiodo v. Cerami et al.* there was judgment decreeing him to be a *holder in good faith* as having *purchased* on faith in the public records; in par. 5, that he had made repeated demands for delivery of a royalty deed *evidencing the sale of said royalty;* in par. 6, that he was entitled to a judgment ordering petitioner to perform the contract and decreeing that, in default thereof, the judgment stand as a muniment of title in plaintiff to the royalty *purchased* by him; in par. 7, that he had deposited $600 in the registry of the court for the account of petitioner. He prayed for judgment ordering petitioner to perform the contract and decreeing that, in default thereof, the judgment stand as a muniment of title in plaintiff to the royalty *purchased* by him.

In support of the exceptions of no right or cause of action (a pleading in the nature of a general demurrer, without specification), counsel for defendant argued that the instrument *was not in form or substance a sale translative of title* and, if it could be held such sale, it would be

complete and no suit for specific performance would lie. Counsel for plaintiff argued that the instrument was a *sale* and amply supported plaintiff's demand. Passing the exceptions, without formal ruling on them, the trial court proceeded to hear the case on the merits, thus overruling them. *Palama v. Livaudais, 182 La. 1035, 1039, 162 So. 765, 766.* Immediately thereafter, counsel for plaintiff, (R.18), offered the instrument, (R. 3, 26), in evidence *as a sale*, to which counsel for defendant objected, (R. 19), that the instrument was not admissible to prove title in plaintiff, for the reasons, 1st, that it was not in form or substance an act of sale translative of title, and 2nd, that it was not a complete reciprocal contract, in that, as appeared on its face, it was not accepted or assented to by plaintiff and was executed by defendant without any consideration. Counsel for plaintiff offered in evidence the petition and the answer of Haas in *Angichiodo v. Cerami et al.*, P. Ex-2, (R. 27-47), the opinion (called decree) in that case, P. Ex-3, *28 Fed. Supp. 720*, (R. 47), and the judgment dismissing that suit as to Haas, P. Ex-4, (R. 53), all to support the allegation of paragraph 4 of his petition that by the judgment in that case he was decreed to be a *holder* in good faith as having *purchased* the royalty interest involved here. Counsel for defendant objected to each of these exhibits as irrelevant and immaterial, and to the decree or judgment on the further ground that it was not responsive to the plaintiff's pleading in this case, but was contradictory thereof. Counsel for plaintiff finally offered in evidence the entire record in *Cerami v. Haas*, (R. 198-209), with particular reference to the judgment therein, P. Ex-7, *197 So. 752, (R. 203)*, in support of the allegation of paragraph 3 of his petition that by that judgment *"the validity of the sale was upheld."* To the offer of all these docu-

ments and to the offer of any testimony whatever counsel for defendant further objected, for the reason that plaintiff was suing on an *alleged completed and executed sale* and the remedy of specific performance is unknown and unsanctioned by the law of Louisiana where the contract sued on is alleged to be a *sale*, and plaintiff, alleging *title in himself by virtue of a completed sale* set out no right of cause of action for a judgment for specific performance. This objection was in all respects the same as urged in arguing for the exceptions.

All defendant's objections were overruled. Plaintiff made no effort to prove mutuality of the alleged *sale* or any consideration to defendant, but relied fully on the judgment in *Cerami v. Haas* as *res judicata* on the validity of the instrument as a *sale*. The court also adhered to that view, (R. 58), as indicated by the suggestion, (R. 22), that defendant's remedy was suit to set the sale aside on the ground of lesion beyond moiety, a proceeding for the rescission of a completely executed sale of real estate on the ground that the price received was less than one half of the value of the property sold at the date of the sale. Civil Code, Arts. 2589, 2590, 1871.

There was judgment for plaintiff, as prayed for, ordering defendant to execute a deed to said royalty as of February 10, 1939, the date of which it was said in *Cerami v. Haas* that Haas impliedly accepted the contract, and decreeing that, in default of such deed, the judgment stand as a muniment of title. The judgment actually confirmed title in plaintiff as of February 10, 1939, and the deed by defendant was to be merely *evidence of the sale*, as plaintiff had prayed. That judgment was entirely responsive to plaintiff's pleading, except that it confirmed title in him

as of February 10, 1939, instead of November 1, 1938, the date on which defendant signed the instrument. Since the judgment in *Cerami v. Haas* clearly did not hold that the instrument was a sale and the instrument itself bore no slight resemblance to a sale, defendant believed the judgment entirely out of harmony with the definition of a sale under the Louisiana law.

> "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to-wit: the thing sold, the price and the consent."
>
> *Civil Code, Art. 2439.*
>
> "In a sale the property, ownership of the thing sold, passes at once out of the vendor and to the purchaser, his heirs and assigns forever."
>
> *Logan v. State Gravel Co., 158 La. 105, 107, 103 So. 526.*

Clearly, then, plaintiff's demand for a deed *evidencing the sale* by which he alleges he had had title more than two years at the time of filing the suit has no place in Louisiana law.

By ignoring the suspensive condition expressed in the instrument plaintiff sought and the court granted confirmation of title in him as of February 10, 1939, despite the provision of Article 2043 of the Civil Code that an obligation subject to a suspensive condition cannot be executed until the happening of the condition. Ownership of the royalty interest would entitle plaintiff to the several

thousand dollars of royalties on production of oil from defendant's land, credited to this interest and held in suspense by the producer.

Such was the judgment from which defendant appealed to the Supreme Court; and he confidently expected a decision on the issues presented by the pleading and emphasized by the record.

Without referring at all to the contention of plaintiff that the instrument was a sale and he was entitled to a deed as evidence of it, the Court held, (R. 183, 184), that the validity of the instrument as an agreement to sell was *res judicata* by the judgment in *Cerami v. Haas.* The Court, quite clearly, deals with the instrument as an *agreement to sell,* (R. 183, last two sentences, 185). That it did consider the instrument an agreement to sell appears from the discussion on page 185, where it was recognized that defendant had proved the royalty interest to have become very valuable "since the agreement was made," but was also held that "in determining the question of adequacy of the price in a contract of sale, the value of the thing sold or *to be sold* must be taken as of the date of the contract, and not at some subsequent date." Specifically, in that discussion and in the opinion *per curiam,* (R. 194), it was held that the "date of the contract" involved here was February 10, 1939. Had the Court accepted the view of plaintiff and the district court that the instrument was a completed and executed sale as of February 10, 1939, it would also have agreed that an action for rescission for lesion beyond moiety was defendant's remedy, if he had any. Discussion of *avoidance of the proposed sale,* under authority of Art. 2464 of the Civil Code would not have been appropriate.

The judgment of the Supreme Court affirmed the judgment of the district court; but, from the opinion, it is obvious that the judgment was intended to be and is for specific performance of an *agreement to sell* by executing a deed conveying to plaintiff a *title not already vested in him*, and not by executing a deed *as evidence of a sale* already completed and executed and *by which plaintiff already has title*. In Louisiana, as elsewhere, *res judicata* must be specially pleaded. *Thompson v. Vance, 111 La. 548, 35 So. 741.* It was pleaded by plaintiff as settling the validity of the instrument as a sale, and he would not have been heard to say that it settled the validity of the instrument as an agreement to sell; and the Court had no right to award him judgment on the ground to which he could not have changed. The legal difference between a *sale*, such as plaintiff alleged and the district court held this instrument was, and an *agreement to sell*, such as the Supreme Court held the instrument was is such that one cannot be substituted where the other is pleaded and relied on.

> "A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same." *Civil Code, Art. 2462.*

> "Any agreement for the sale of real estate which is not intended to be the final writing between the parties, but, on the contrary, to be followed by another and final deed, is a mere promise of sale and not a sale, and does not transfer title to said property." *Trichel v. Home Insurance Co., 155 La. 459, 99 So. 403.*

The judgment of the Supreme Court is not respon-

sive to the pleading or within the issues of the case, and the Court had no jurisdiction or power to render it. For that reason, the judgment should be decreed null and void.

POINT 1, (c)

As set out in paragraph 4 (d) of the petition for *certiorari* and more fully in discussion of Point 1, (b), immediately above, the ruling that the judgment in *Cerami v. Haas* was *res judicata* on the validity of the instrument, (R. 3, 36), as an agreement to sell was first made in the Supreme Court, and the application for rehearing presented the first opportunity for petitioner to raise the Federal question. The question was timely raised. See authorities cited in paragraph 3, (e) of the petition for *certiorari*.

POINT 2, SECOND QUESTION

Petitioner contends that the ruling of the Supreme Court of Louisiana that the instrument upon which plaintiff is proceeding, (R. 3, 26), is a complete reciprocal contract to sell and the judgment of said Court decreeing that petitioner is bound by said instrument and shall convey to plaintiff the one-quarter royalty interest described therein, or that the judgment shall stand a muniment of title in plaintiff, are erroneous and deprive petitioner of his property, without due process of law, in contravention of that clause of Sec. 1 of the Fourteenth Amendment, providing, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Petition herein, par. 5; Answer, pars. 5, 9, 11, 18, 19, 20, (R. 7); Rule for New Trial, pars. 1, 2, 2 (a), (b), (R. 61); Petition for Rehearing, pars. 4-9, 14, (R. 186).

POINT 2, (a). For want of mutuality and consideration, the instrument is not on its face a reciprocal contract to sell, and assent of plaintiff was not alleged or proved.

POINT 2, (b). The affidavit by plaintiff appended to the instrument was not in evidence, and is, as construed by the Supreme Court, contradictory of the judgment in *Cerami v. Haas*, upon which plaintiff relies and which the Court held to be *res judicata* on the validity of the instrument; hence, it could not legally be considered as evidence and as the basis for judgment. Said affidavit, if legally subject to consideration as evidence, is not acceptance by plaintiff or evidence of agreement between the parties.

POINT 2, (c). It was not permissible to ignore the suspensive condition expressed in the instrument.

POINT 2, (a)

> "He who claims the execution of an obligation must prove it." *Civil Code, Art. 2332; Pittsburgh & Southern Coal Co. v. Slack & Co., 42 La. Ann. 107, 7 So. 230.*

The instrument lacks mutuality, in that it is signed by petitioner only and there is not elsewhere in the record evidence of plaintiff's assent to it, as required by the articles of the Civil Code of Louisiana for the consummation of contracts. Nor is there any allegation by plaintiff that he did assent to it. He alleges in his petition that the instrument is a sale, that the Supreme Court held in *Cerami v. Haas, supra*, that it was a sale and the United States District Court held in *Angichiodo v. Cerami et al.*, that

plaintiff was a holder in good faith as a purchaser on faith of the record. If the instrument is not in itself a complete reciprocal contract of sale, and clearly it is not, and if the judgments relied upon as holding that it is a sale do not so hold, and they clearly do not, the record is devoid of any evidence of mutuality of the contract. (R. 3, 26; R. 201, 203-206; R. 27-47, 47-53, 53.)

> "It is the assent of the party, or that of the person with whom he contracts which gives the contract its binding force. Both parties must be bound or neither." *Cavalier v. Germain, 6 La. Rep. 215.*
>
> *Turner v. Snype, 162 La. 117, 119, 110 So. 109;*
>
> *Thompson v. Union Sawmill Co., 121 La. 318, 46 So. 314;*
>
> *Torjusen v. Linn, 145 La. 352, 82 So. 367.*

In each of the following cases the contract, purporting to be a sale of timber and signed by the land owner as vendor, was held void, because it was not signed or accepted by the vendee:

> *Union Sawmill Co. v. Lake Lumber Co., 120 La. 106, 44 So. 1000;*
>
> *Thompson v. Union Sawmill Co., 121 La. 318, 46 So. 341;*
>
> *Riley v. Union Sawmill Co., 122 La. 863, 48 So. 334;*
>
> *Union Sawmill Co. v. Mitchell, 122 La. 900, 48 So. 317;*

Snell v. Union Sawmill Co., 159 La. 604, 608, 105 So. 728.

And in *Harang v. Ragan, 134 La. 201, 63 So. 875,* it was held that an instrument in the form of an agreement to sell, signed by Regan only and not accepted in a separate instrument by Harang, was a unilateral proposal to sell, and was void for want of mutuality.

It has been consistently held that an interest in all the oil, gas and other minerals under the surface of land falls in the category of immovables. *Hanby v. Texas Co., 140 La. 189, 72 So. 933.*

Goldsmith v. McCoy, 190 La. 325, 182 So. 519;

Jefferson v. Childers, 189 La. 46, 179 So. 30.

And that is also true under Act 205 of 1938, which was adopted for the purpose of putting in statute form the rule already adopted by the Courts.

Article 2440 of the Civil Code is a rule of substantive law, in that it provides that sales of immovable property otherwise than by authentic act or under private signature shall be null, and, with a single exception, Civil Code, Art. 2275, cannot be proved.

Goldsmith v. Parsons, 182 La. 122, 161 So. 175;

Carter v. Loeber, 177 La. 444, 148 So. 673;

Lindner v. Cotonio, 175 La. 352, 143 So. 286;
and on back through an unbroken line of decisions to

Heirs v. Yocum, 3 Mart. (O. S.) 424,
in which in 1814 it was said:

> "Nothing can be more positive than the prohibition of our law ever to recognize as valid a verbal sale or a verbal promise to sell, an immovable or a slave." Citing Civil Code, Art. 2437, now 2462.

Plaintiff has not alleged it, but may urge here, as he did in argument in support of his exceptions in *Cerami v. Haas*, that his acceptance of the contract is implied from his filing it for record on February 10, 1939, three and a half months after its date. But that is not tenable. As defendant alleged in paragraph 11 of his answer, (R. 9), the instrument dated November 1, 1938, does not grant plaintiff a right or option to accept it at a future date, or to purchase the royalty at a future date. It does not conform in any respect to Article 2462 of the Civil Code, that one may purchase the option to accept an offer or promise to sell within a stipulated time after the date of the purchase thereof, for any consideration agreed upon. Nor can plaintiff urge that, without a formal option, he had the right to accept the contract at some future time that his convenience or advantage might dictate. The instrument is in the form and substance of a contract *in praesenti*, to be completed at the moment by the assent of both parties thereto; and where such instrument is signed by one party the other has no delay in which to accept, not absolutely necessary to do so. Civil Code, Art. 1809. Considering an instrument which purported to be a sale, but was signed by only the vendor, the Court said:

> "it is important in this connection to observe that what we may have called an 'offer' is not in the form of an offer at all. The language used imports a contract, completed at the moment by the assent of both the parties thereto."

And it was held that the named purchaser had not a delay in which to accept.

Riley v. Union Sawmill Co., supra;
Union Sawmill Co. v. Lake Lumber Co., supra.

In *Union Sawmill Co. v. Mitchell, 122 La. 900, 48 So. 317,* the same form of contract was considered, with particular reference to an alleged acceptance of it sometime later. The Court said:

> "As a matter of fact, the vendees waited for giving their acceptance until the construction of the railroad had become an assured thing, more than a year after the Loper contract, and *more than three months* after the date of the two other contracts. In other words, theirs was pure speculation. If the railroad came to make the timber valuable, they accepted; if not, not. We do not think the intention was to allowed then this opportunity for speculation." *Civil Code, Arts. 1801, 1802, 1809.*

In view of the fact that it is admitted that, on November 1, 1938, the date on which petitioner signed the instrument, there was no production of oil on this land or in the immediate vicinity, and of the completion of the well on the Haas land adjoining petitioner's land during January, 1939, Haas Test., R. 23; D. Ex. 23, (R. 177), not admitted in evidence in the trial court but referred to in the opinion of the Supreme Court, and of the recordation of the instrument by plaintiff on February 10, 1939, we paraphrase the above quotation from the *Mitchell* case:

> "As a matter of fact, the vendee waited for giving his acceptance until the discovery of the oil

> field had become an assured thing, *more than three months* after the date of the contract. In other words, his was pure speculation. If the oil well came in to make the royalty interest valuable, he accepted; if not, not. We do not think the intention was to allow him this opportunity for speculation."

Even if it should be held that plaintiff had the right to accept this instrument three and a half months after this date, the fact remains that acceptance of an agreement to sell immovables cannot be implied. *Article 2462 of the Civil Code* provides that such agreement, if it is in writing, so far amounts to a sale as to give either party the right to enforce specific performance of it. It is not a rule of evidence; that the instrument must be in writing to exist at all is substantive law. It necessarily follows that acceptance of such agreement cannot be implied.

Levy v. Levy, 114 La. 239, 38 So. 155.

As to consideration, it is sufficient to say that none was paid for the alleged contract, and that under Articles 1893, 1896 and 1768, a contract without a consideration is void.

POINT 2, (b)

Holding that the judgment in *Cerami v. Haas,* (R. 203), was *res judicata* and settled finally the law of the case on the validity of the instrument as an agreement to sell, (R. 181-184), the Supreme Court declined to consider the question of invalidity of the instrument, for want of mutuality and consideration, urged by petitioner. That conformed to the rule in Louisiana, as elsewhere, that

where a judgment of a court of competent jurisdiction has become final questions determined in the case are conclusive on the parties. *McNeely v. Hyde, 46 La. Ann. 1083, 15 So. 167.* The rule is too well-settled to require citations.

But the Court immediately proceeded, to consider the affidavit of plaintiff appended to the instrument, and held that it was written evidence of the agreement between the parties. The Court erred because, 1st, the question being *res judicata* by the judgment in *Cerami v. Haas,* the Court had not jurisdiction to consider the validity or invalidity of the instrument; 2nd, plaintiff had not pleaded acceptance by that affidavit or offered it in evidence as proof of acceptance; 3rd, holding that the affidavit was written evidence of the acceptance by plaintiff directly overruled *Cerami v. Haas,* in which it was said that: "The contract of November 1, 1938, *shows on its face the reciprocal consent of both parties* 'as to the thing, the price and terms'," thus meeting the requirements of Article 2462 of the Civil Code there quoted, (R. 204, 205), (Italics by the Court); and, also on page 205, "such recordation was also an act on the part of the defendant clearly indicating acceptance of the contract"; 4th, the affidavit is not and does not purport to be an acceptance by Haas, and he never pretended that it was, as evidenced by his reliance upon acceptance implied from his filing the instrument for record, in *Cerami v. Haas,* and reliance in this case upon the judgment in that case as *res judicata.* We referred to this quite fully in paragraphs 4, 5 and 6 of the petition for rehearing, (R. 188). As a matter of fact, plaintiff did not pretend to execute the affidavit as a principal to the instrument, but as a witness to it, and for the sole purpose of meeting the requirements of Article 2253 of the Civil

Code, as uniformly construed, that signatures to every private instrument affecting real estate must be proved before recordation of the instrument.

We submit that, in so far as the judgment against petitioner is founded upon that affidavit, it should be considered and held null and void, and coming within the scope of POINT 2, SECOND QUESTION.

POINT 2, (c)

That the judgment herein is arbitrary and oppressive is, we believe, not open to question. In the instrument, (R. 3, 26), it is expressly provided that petitioner will execute a royalty deed "upon perfection of title defects now being straightened out." Plaintiff took cognizance of that condition by filing this suit (R. 1), on November 13, 1940, the day after the decree of the United States District Court rejecting Angichiodo's claim to the land, (Opinion, October 21, 1940, 35 Fed. Supp. 359), not in this record, but referred to in paragraph 5 of plaintiff's petition as decreeing plaintiff's title good and valid and free from defects. Plaintiff also referred to the condition in paragraph 2 of his petition, and made the instrument itself part of his petition. The district judge noticed it in his opinion, (R. 56), the Supreme Court had recognized it in the opinion in *Cerami v. Haas*, (R. 203), and recognized it again in the opinion in this case, (R. 181). The existence of that condition was recognized by all concerned. Petitioner, as defendant, filed a plea of prematurity, (R. 4), which he withdrew on January 22, 1941, for the reasons set out in his motion, (R. 5), thus waiving the condition as of that date. Plaintiff had waived it by his suit, so that on *January 22, 1941*, the obligations of the parties,

if there were any, became executory and subject to enforcement by either party.

It had been said in *Cerami v. Haas*, (R. 203), that acceptance of the instrument by Haas was implied from his filing it for record on February 10, 1939. Ignoring the condition altogether, the district court ordered petitioner to execute a deed to plaintiff as of *February 10, 1939*, and decreeing that, in default of such deed, the judgment stand as a muniment of title in plaintiff, as of *February 10, 1939*. The Supreme Court affirmed that judgment, (R. 181). Plaintiff had not prayed for such judgment, but got it. Article 2043 of the Civil Code provides that an obligation contracted on a suspensive condition which depends on a future event cannot be executed until after the happening of the condition. Between February 10, 1939, and January 22, 1941, five producing oil wells were drilled on petitioner's land and royalties credited to the royalty interest involved here and held in suspense by the producer on account of the Angichiodo suit and this controversy amounted to over $5,000 by the latter date, as appears from the evidence in the record and to which we shall refer in discussing POINT 3, THIRD QUESTION, in this brief. Since royalties will follow ownership of the royalty interest, the implications of this feature of the judgment are clear.

We submit that, for the foregoing reasons, the judgment herein is in contravention of the statute law of the State of Louisiana governing contracts, and particularly Article 2043 of the Civil Code, and is void.

POINT 3, THIRD QUESTION

Petitioner contends that, having held that the instrument upon which plaintiff is proceeding, (R. 3, 26),

was a complete reciprocal agreement to sell, the Supreme Court of Louisiana erred in rejecting petitioner's pleading that the price stipulated in said instrument was out of all proportion to the value of the royalty interest which is the subject of said agreement at the date of the sale, and the proof thereof, and the judgment of said Court decreeing that petitioner is bound by said instrument and shall convey to plaintiff the one-quarter royalty interest described therein, or that the judgment shall stand as a muniment of title in plaintiff is erroneous and deprives petitioner of his property, without due process of law, in contravention of that clause of Sec. 1 of the Fourteenth Amendment, providing, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Answer, par. 17, (R. 10); supplemental answer, (R. 13); Opinion and judgment of the trial court, (R. 56); rule for new trial, pars. 1, 2, 2 (b), (c), (R. 61); opinion and decree of the Supreme Court, (R. 181, 185); petition for rehearing, pars. 10, 11, 12, (R. 190); opinion *per curiam* and order denying rehearing, (R. 194).

POINT 3, (a). The date of the sale was January 22, 1941.

POINT 3, (b). To determine whether or not the price is out of all proportion to the value of the thing sold, it is necessary to take the value as of the date of the sale.

POINT 3, (c). The provisions of Article 2464 of the Civil Code are applicable to sales of royalty interests.

POINT 3, (d). The price stipulated in the instrument is $600 and the evidence shows that, as of the date of the sale, the royalty interest had an actual value of

$95,264, including returns from production credited to it and held in suspense by the producer on account of conflicting claims and known reserve.

Of course, as said in paragraph 17 of his answer, petitioner's pleading and argument in reference to the disproportion between the price and the value of the royalty interest are necessarily in view of it being finally held that the instrument sued on is a complete reciprocal agreement to sell.

POINT 1, (a). The Supreme Court, (R. 185), referred to "the agreement" twice and to "the contract" twice, and in the last sentence speaks of "a sale or an agreement for the sale of mineral rights" and of "the value of mineral rights sold or to be sold", but did not say when this agreement for the sale of mineral rights became or would become a sale within legal contemplation. Such an expression would have been helpful. Several articles of the Civil Code, to which we refer, are informing:

> "2462. A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, *so far amounts to a sale, as to give either party the right to enforce specific performance of same.*"

The corresponding article of the Civil Codes of 1808, 1825 and 1870, and Article 1589 of the Cope Napoleon, read:

> "A promise to sell *amounts to a sale*, when there exists a reciprocal consent of both parties, as to the thing and the price thereof."

Differently from the French courts and law writers, the Supreme Court of Louisiana had already construed the article to mean just what *in its present form* it expressly means.

> "We understanad article 2437 (now 2462) to mean that a promise to sell, when the thing to be sold and the price of it are agreed upon, is so far a sale that it gives either party the right to claim *ricta via*, the delivery of the thing and payment of the price; but such promise does not place the thing at the risk of the promisee, *nor does it transfer to him the ownership or dominion over it.*"
>
> *McDonald v. Aubert, 17 La. Rep. 448.*

Where the written agreements were declared by the parties to be sales, but there remained a further instrument to be executed to vest title in the vendee, they were held to be only agreements to sell.

> *Broadwell v. Raines, 34 La. Ann. 677;*
> *Thompson v. Duson, 40 La. Ann. 712;*
> *Baldwin v. Morey, 41 La. Ann. 1105, 6 So. 796.*

These cases and *Trichel v. Home Insurance Co., supra*, are representative of a large number of cases, with no digressions from the jurisprudence.

> "2043. The obligation contracted on a suspensive condition, is that which depends, either on a future or uncertain event, or on an event which has actually taken place, without its being yet known to the parties. In the former case, the obligation can not be executed till after the event; in the latter, the obglication has its effect from the day on which it was contracted, but it cannot be enforced until the event be known."

In harmony with that article, it was held in *Lewis & Co. v. Brock, 123 La. 1:*

> An agreement to buy real esate, "provided the titles are good and sufficient and approved by a judgment of court," has no binding effect until the condition has happened."

The obligation of the agreement under discussion is that petitioner will execute a royalty deed "upon perfection of title defects now being straightened out"; and those "title defects" were the suit of Angichiodo, claiming to own the land, as all agree, and the Supreme Court observed in its opinion, (R. 181). This case parallels the case just cited. So long as the "title defects" were not "straightened out" by a judgment rejecting Angichiodo's claim, neither party could demand and enforce performance of the contract by the other, in the absence of a waiver of the suspensive condition by both of them. But the instant there was such waiver by both the contract became an unconditional promise to sell, and gave "either party the right to enforce specific performance of same." Civil Code, Art. 2462. The uniform rule is that, where one is entitled to demand specific performance and does demand it, at the same time complying with his obligation under the contract, he will be decreed the owner of the property from the date of his demand and performance.

Plaintiff waived the suspensive condition of the contract by filing suit for specific performance on *November 13, 1940,* and petitioner waived the condition by withdrawing his exception of prematurity, (R. 4), on January 22, 1941, (R. 5). The suit was ample demand and the purchase price had been deposited in the registry of the court, so that, in the event of success in the suit, plaintiff should be decreed to be the owner of the royalty interest as of

January 22, 1941. That was the date of the sale.

POINT 3, (b). Article 2464 of the Civil Code, upon which petitioner relies, reads:

> "The price of the sale must be certain, that is to say, fixed and determined by the parties . . . It ought not to be out of all proportion with the value of the thing; for instance, the sale of a plantation for a dollar could not be considered a fair sale; it would be considered as a donation disguised."

Although the Court expressed no opinion as to the *date of the sale*, it did hold that, to determine whether or not the price was out of all proportion with the value of the royalty interest, the value should be taken as of the date of the contract, which it said was November 1, 1938, the date on which petitioner only signed the letter. Petitioner stressed the error of that ruling in pars. 10 and 11 of his petition for rehearing, (R. 190); and in its opinion *per curiam* the Court held that the date of the contract was February 10, 1939, the date of plaintiff's "implied acceptance" of the contract, but still refrained from an expression on the date of the sale. The Court cited *Ronaldson & Puckett v. Bynum, 122 La. 687, 48 So. 152*, as supporting its views, but examination of the original record in connection with the opinion disclosed the following:

> "On *August 1, 1900*, Mrs. Bynum leased to Ronaldson & Puckett a plantation for a period of five years, with the privilege of purchasing the property at any time during the term of the lease for $9,500; on *May 3, 1903*, two years and nine months later, they informed her in writing that they 'desired to exercise their privilege under the contract to buy said plantation'; she refused to convey title, and on *May 13, 1903*, they made formal tender of the price set out in the agreement and

demanded that she execute a deed conveying the property to them. She refused. They sued for specific performance of the agreement to sell, and prayed that Mrs. Bynum 'be ordered to sign an act of sale transferring said plantation to petitioner and to receive said price; that, in the event of her refusal to sign the act of sale, it be decreed that said property pass to petitioner on *May 13, 1903*, by reason of the tender and other facts recited, and that the judgment stand in lieu of said signature.' In her answer, Mrs. Bynum admitted the execution of the lease and option as alleged by plaintiff, and further alleged that the exercise of 'said alleged privilege or option would have been invalid and illegal, because of the fact that said plantation, *at the time of the pretended exercise of said alleged option*, was worth more than twice $9,500.00, and such sale, if otherwise valid, would have been void for lesion beyond moiety.'

"Plaintiff contended that for the purpose of determining whether or not there was lesion beyond moiety, the value of the property should be reckoned as of *August 1, 1900*, the date of the agreement by which, for a valuable consideration, defendant bound herself to sell the property. Defendant contended that '*May 13, 1903*, should be the date, under authority of Article 2590 of the Civil Code, which says that the price should be determined "at the time of the sale".'"

Upon thoughtful consideration and a review of French authorities, the Court held that the value of the property should be taken as of May 13, 1903. In a word, it was held that the value should be taken as of the date on which the right accrued to each party to demand and enforce specific performance. That was the "date of the sale."

The Court has treated the action for rescission for lesion beyond moiety and proceedings to void the agreement to sell here as analogous. Both Article 1871 and Article 2590 of the Civil Code provide that, to ascertain whether or not there is lesion beyond moiety, the immovables must be estimated at their value at the time of the sale.

> "In all questions of lesion the value of the property sold at the time of the sale is the rule by which the lesion is to be ascertained." *Mayard v. Laporte, 109 La. 110.*

We submit that the article is clear, and that the Court's ruling is definitely at variance with it.

POINT 3, (c). The Court held that, because the value of a royalty interest in unproven land is speculative, there was no right under Art. 2464 to "annul a sale or an agreement for the sale of minerals rights in non-producing land, on the ground that the price stipulated is out of all proportion to the value of the mineral rights sold or to be sold." But for arbitrarily holding that the value must be taken as of the date of the agreement to sell and not the date of the sale, the Court would have had no situation to which to apply that statement, because on the date of the sale there were five producing oil wells on petitioner's land, and there was nothing speculative about production. Even so, we construe *Wilkins v. Nelson, 155 La. 807, 99 So. 607*, and other cases in which it was held that sales of mineral rights in unproven and non-producing land would not be rescinded for lesion beyond moiety, without exception, to be based on the impossibility of proving value with any certainty.

In *Sanders v. Busch-Everett Co., 138 La. 1049, 71 So. 153*, the decision was reached upon a finding that the consideration for the option or right to drill for oil and gas was not "out of all proportion to the value of the thing," within the meaning of Article 2464 of the Civil Code. In their brief, quoted at page 1064 of the opinion, counsel for plaintiff argued that the "leases were void for want of mutuality and as containing a potestative condition," and cited *Murray v. Barnhart, 117 La. 1026, 42 So. 489; Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253; Gray v. Spring, 129 La. 360, 56 So. 305; Goodson v. Vivian Oil Co., 129 La. 958, 57 So. 281;* and *Long v. Sun Co., 132 La. 601, 61 So. 684,* in support of their views. But the Court rejoined:

> "We apprehend, however, that upon careful consideration of the cases upon which the counsel rely, as well as others which are supposed to have dealt with the issues here presented, *it will be found that in each of them,* by reason of differences in the contracts, the issues were not the same as here, and *that upon the whole, the conclusions of the court were predicated upon its finding that there was no serious price, or price proportioned to the value, as contemplated by C. C. 2464, moving to the owner of the land as a consideration for the rights conveyed to the other party.*" (Italics ours.)

In everyone of these cases "the right conveyed to the other party" was the right or option to drill for oil or gas on non-productive and unproven land. We have found no case in which the ruling of the Court was the same as here. The above cases establish a fixed line of jurisprudence.

In *Murray v. Barnhart, supra,* it was said:

> "At common law 'the slightest consideration is sufficient to support the most onerous obligation. The adequacy, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.' 9 Cyc. 365; A. & E. Ency. vol. 6, p. 694. But under our law the consideration 'must be serious'; it must not be out of all proportion to the value of the thing." Art. 2464, Civ Code.
>
> "That article has special reference to the price of a sale, but the principle involved is not peculiar to sales. It is the general of the civil law, and as old as the civil law itself."

The court had no authority to except from the operation of Article 2464 any class of property, and its action should be set aside.

POINT 3, (d). While, as set out in Paragraph 6 (c) of the petition for *certiorari*, the testimony taken out of court and the exhibits returned with and as part of the testimony, were ruled inadmissible, (R. 21, 22), they are in the record identified with an exception to the court's ruling, and if deemed admissible, they might have been considered by the Supreme Court as evidence. *Young v. Parish of East Baton Rouge, 116 La. 379, 40 So. 768, 769.* It was said in the opinion of the Supreme Court that the evidence introduced by petitioner showed that the royalty interest had become very valuable since the agreement was made, but for reasons discussed in the foregoing paragraphs, the Court gave it no consideration. Documents filed and retained in the office of the Department of Minerals, pursuant to law and the rules of the Department are public records and copies certified by the custodian thereof are admissible in evidence. *Succession of Derigny, 128 La. 853, 858, 55 So. 552.*

Mr. Moresi, qualified as an expert geologist, testified fully with respect to the oil under petitioner's land, (R. 70, 82). His report, Def. Ex. 22, contains substantially his testimony. He calculated that, as of November 1, 1940, the reserve under petitioner's land was worth $90,516.52, to which should be added the amount held in suspense by the producer to the credit of this one-fourth royalty, one-fourth of 15,295 barrels at $0.98 per barrel, $3,747.52 to November 1, 1940, or a total of $94,264. Calculated from the monthly reports, Def. Ex. 20 (R. 158), and Def. Ex. 21, (R. 167), there was an additional amount of 1,083.88 held in suspense for November and December, 1940, or a total of $4,831.40.

From the testimony of Mr. Carnahan, (R. 75), and Mr. Lambremont, (R. 78), both qualified as expert dealers in royalties and mineral rights, it appears that at the time they were testifying, March 13, 1941, the twenty and one-half royalty acres comprising the one-fourth royalty interest involved here, had an active market value of from $1,200 to $1,400 per acre, or a total of $26,650 to $28,700.

We submit that the Supreme Court erred by rejecting the statute law of the State and adopting its own rule, and by reason thereof, refusing to examine the testimony in the record and render judgment for petitioner, because of the great disproportion between the price and the value of the royalty interest.

We have presented our view of the facts and the law of this case as well as we could, and we earnestly hope that upon consideration of the petition and brief, along with the record, the Court will find that the Federal questions presented were necessarily decided, in order to make the

judgment adverse to those claims. Had the Court maintained any one of them, it could not have rendered the judgment against defendant.

We earnestly believe too that, if the record is ordered up, the Court will find it necessary to consider the evidence and particularly the lack of evidence to support the judgment.

We understand that the principle here is so well-settled as not to require argument or citations, and we shall burden the Court with none besides a single citation to make clear our understanding of the matter:

> "But a State may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the Amendment. In determining what is due process of law regard must be had to the substance, not to form." *Chicago, B. & Q. Railroad Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.*

We respectfully submit that the writ of *certiorari* prayed for should be granted, and that the judgment complained of should be reversed.

GEORGE SETH GUION,
THOMAS E. FURLOW,
R. HARRY OLIVER, JR.,
SEABORN L. DIGBY,
Attorneys for Petitioner.